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No. 72-1631

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In the Supreme Court of the United States

OCTOBER TERM, 1973

SOCIALIST WORKERS PARTY, PETITIONER

v.

E.T. KLASSEN, POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, an organization which since 1947 has been on the Attorney General's list of subversive organizations,[1] seeks a determination in this case that

[1]Executive Order 9835, 12 Fed. Reg. 1935, issued March 21, 1947, established an Employees Loyalty Program in the Executive Branch of the government. By this order, the Department of Justice was directed to furnish the Loyalty Review Board with the name of each organization which the Attorney General, after appropriate investigation and determination, designated as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." The name of the petitioner was among those transmitted to the Loyalty Review Board on November 24, 1947. Pursuant to the same authority, the Loyalty Review Board disseminated such information to all federal departments and

the Attorney General lacks constitutional authority to compile such a list. The case was originally brought as a joint action in United States District Court for the District of Columbia by petitioner and one of its members, Duncan Gordon. The latter, a substitute letter carrier, had denied on his job application form being a member of any organization which "favors the overthrow of the constitutional form of government of the United States or which seeks by force or violence to deny other persons their rights under the Constitution of the United States." The Civil Service Commission had ruled, on the basis of petitioner's inclusion on the Attorney General's list, that this answer constituted a false statement which required that Gordon be dismissed and barred from other government employment for a one year period.

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agencies on December 4, 1947, and public notice was given of such action in the Federal Register on March 20, 1948, 13 Fed. Reg. 1471.

On April 27, 1953, President Eisenhower issued Executive Order 10450, 18 Fed. Reg. 2489, which revoked and superseded Executive Order 9835 and established new standards and procedures, based on considerations of security rather than loyalty, governing the employment and retention in employment of persons in the federal service. As in the earlier loyalty program, one of the factors to be considered in reaching the prescribed determination of whether employment is "clearly consistent with the interests of national security," and concerning which information was to be developed, was membership in organizations which are "totalitarian, Fascist, Communist, or subversive * * *" (Section 8(a)(5)). The new order continued the direction that the Attorney General furnish information concerning designated organizations, but provided that it be furnished directly to the heads of the executive departments and agencies (Sections 12 and 13). Pursuant to Executive Order 10450, the Attorney General, on April 29, 1953, redesignated the organizations previously designated under Executive Order 9835, including the petitioner, 18 Fed. Reg. 2741.

The letter carrier sought reinstatement and back pay. Petitioner alleged that it was irreparably injured by its inclusion on the list and the use of the list by the Civil Service Commission, in that the reputation and prestige of it and its members were damaged, it suffered loss of membership dues and other revenues, and there was interference with the circulation of its publications, the conduct of its activities, and the fulfillment of its purposes. The dismissal of the letter carrier was cited as one example of the type of injury suffered by petitioner and its members. Other examples cited were the use of the list by the Department of Defense for screening defense industry employees, and by the Coast Guard for screening applicants for employment in the Merchant Marine, and similar allegedly invidious uses of the list by state and local governments and by private groups and individuals.

Petitioner sought (1) a declaration that both the compilation of the list and petitioner's inclusion thereon are illegal and unconstitutional and (2) orders enjoining the Attorney General from continuing the list in effect, requiring him to notify all government agencies and the public generally that petitioner's listing was illegal, void, and withdrawn, and enjoining the Civil Service Commission from continuing to use the list.

The case became moot as to the letter carrier when he was restored to duty with full rights to back pay. The district court found, however, that petitioner had a continuing interest in the suit because of the possibility of similar use of the list in respect to others of its members who were government employees (Pet. App. 9a). While holding that compilation of the list was constitutionally authorized (Pet. App. 10a-11a) and that petitioner was barred by laches from challenging its inclusion

thereon (Pet. App. 9a), the court ruled that the list could not be used against any government employee in the manner in which it had been used against the letter carrier (Pet. App. 11a). It therefore entered an order permanently enjoining the use of the list as the sole basis for finding that a member or former member of petitioner had made a false statement on the loyalty oath section of his application for government employment (Pet. App. 5a-6a). On appeal by petitioner, the court of appeals affirmed without opinion (Pet. App. B).

As the memorandum opinion of the district court, upon which we rely, indicates (Pet. App. D), petitioner received the full remedy to which it was entitled.[2]

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[2]The district court opinion observed (Pet. App. 11a) that there is ample statutory authority to support Executive Order 10450, citing, in addition to the various statutes supporting that authority, *Cummings and Rudd* v. *Hampton* (N.D. Cal., No. C-70-2130 RFP, decided February 1, 1971). That decision entailed the grant of a preliminary injunction against the use of certain questions on a government employment form. The court ultimately issued a permanent injunction against a modified version of the questions (Pet. App. E). Contrary to the petitioner's suggestion (Pet. 9), the government has appealed the latter decision. *Cummings* v. *Hampton* (No. 72-2559, C.A. 9). The broad issue raised here concerning the authority to compile a list of subversive organizations, vis-a-vis the manner in which such authority is exercised, is not presented in *Cummings*.

In this respect, we note that the authority to compile such a list was implicitly recognized by this Court in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512-513. In *Aptheker*, the Court declared unconstitutional Section 6 of the Subversive Activities Control Act of 1950, which provided that, when a Communist organization was registered or under final order to register, it was unlawful for a member with knowledge of this status to apply for or use a passport. One of the bases for declaring the prohibition unconstitutional was the availability of less drastic means of safeguarding national security. One such means, expressly noted by the Court, was the Federal Employee Loyalty Program established pursuant to Executive Order No. 9835, the precursor of

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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the now-operative Executive Order No. 10450, under which membership in a Communist organization was one factor to be weighed in determining the loyalty of an applicant or employee.

Moreover, this Court recognized in *Cole* v. *Young*, 351 U.S. 536, 543-544, that Executive Order 9835 was promulgated pursuant to the authority of the general personnel laws and was not, as petitioner suggests, primarily dependent upon authority conferred by statutes which have been declared unconstitutional (*e.g.*, 5 U.S.C. 7311; see *Stewart* v. *Washington*, 301 F. Supp. 610 (D.D.C.)).

The President's constitutional and statutory powers in issuing Executive Order 9835, which established the Federal Employee Loyalty Program, came under attack in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. This Court there determined that Executive Order 9835 was defective by virtue of its failure to provide procedural due process. The opinion did not, however, suggest either that the Program was unconstitutional or that the President lacked the power to delegate to the Attorney General authority to utilize for the purposes of the Program a list of designated organizations, and, of course, it did not consider the procedures available under Executive Order 10450 which was in effect at the time this case was brought. Executive Order 10450, was amended by Executive Order 11605, 36 Fed. Reg. 12831, issued on July 2, 1971. Among other things, that order transferred to the Subversive Activities Control Board the function of conducting hearings and making findings on organizations proposed for designation by the Attorney General. It also established standards for determining whether an organization came within a designation category. Previous designations were not affected, except to the extent that any designated organization, under Section 2(i) of the Order, could petition the Board for a determination "that such organization does not currently meet the standards for designation." Executive Order 11605 was, however, vitiated when funds were not appropriated for its implementation. Thus, there is presently no method available by which a designated organization may challenge its listing. The Department of Justice is presently considering new regulations to remedy this situation.